Supreme Court, U. S.
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CASE NO. 80-200

in the

Supreme Court
of the
United States

October Term, 1979

CHASE MORSEY, JR.,

Petitioner,

vs.

ELMER G. GREEN and
FIRST NATIONAL BANK IN PALM BEACH,

Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE[1]

Respondents complain of Morsey's brevity in advising this Court of the facts.[2] Respondents' lengthier statement, however, in fact confirms and corroborates Morsey's own fact summary.

Respondents expand on Morsey's summary selectively, obviously to convince this Court of their version of the disputed facts: (1) the nature of the efforts which Green promised and on which Morsey relied; and (2) Morsey's control over the enterprise. Respondents' fact statement, while accurately taken from the record, is not complete.

Morsey testified that, as an investor, he did not anticipate or exercise any significant control of the enterprise; that the income streams were a material inducement of his investment; and that he relied on Green's representations that Green, using his unique expertise, reputation, and market position, would manage the income streams and effect a quick, profitable resale:

> [Green] told me that none of his investors had ever lost any money. . . . He also said that one of the requirements that he had of his investors was that

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[1]The abbreviations used in Morsey's Petition will be continued herein. Additionally, Respondent's abbreviation (EVH) for the evidentiary hearing will be used.

[2]The Bank states at p. 3 of its brief:

> As in the Fifth Circuit, Morsey complains of the District Court's fact findings but does not refer to the facts developed by the evidence.

The implication that in the Fifth Circuit Morsey did not discuss the evidence with appropriate record references is simply false.

he would manage the property, that he would handle all of the negotiations for the property, and that he preferred his investors to stay away and not bother him and that he would manage it and operate the ranch and see that we would get the income and he would arrange to sell it.[3]

* * *

He said that he would manage the ranch.[4]

* * *

Mr. Green told me that he was going to manage everything; that he would run the ranch and operate the trust. And I was never consulted at any time by Mr. Green or the bank.[5]

* * *

I did not feel that there had to be any rise in the value of the land. . . . Mr. Green explained to me that we were making a very, very good purchase. He stole the property, is what he said to me, for $755 an acre; that it was worth $1,100 an acre today on today's market. He talked to me about his expertise in part of the negotiations and he sent me a copy of an article from *The Floridian* that stressed his expertise.[6]

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[3]EVH 10

[4]EVH 16

[5]EVH 18

[6]EVH 27

The record amply supports the fact summary in Morsey's Petition.

ARGUMENT

I

FACT QUESTIONS NECESSARY TO DETERMINE THE EXISTENCE OF A SECURITY ARE FOR THE JURY

Respondents do not even attempt to refute Morsey's contention that fact questions necessary to determine whether a security exists are for the jury. Instead, Respondents state evasively that "the question of whether the relevant facts present a jury question is itself a question of law for the Court."[7]

Here, the district judge's legal determination was necessarily and expressly based on his factual determinations, on disputed evidence: (1) that Morsey shared control of the enterprise, and (2) that the expectation of profit was based on market appreciation rather than on Green's entrepreneurial efforts. There was ample evidence for a jury to find otherwise.

Respondents suggest that no jury trial was required because of the district judge's power to resolve factual disputes to determine subject matter jurisdiction. Respondents studiously ignore, however, the limitations on that power. *See McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 362-363 (5th Cir. 1967):

> However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues

[7]Green's brief p. 5. *See* Bank's brief p. 11.

should be deferred to the merits, for it is impossible to decide the one without the other.

The Bank cites *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973), as holding that factual disputes necessary to determine jurisdiction must be resolved by the trial judge. The case holds nothing of the sort. Noting that "the jurisdictional issue under the Sherman Act is distinct from the substantive issue," the court ruled:

> It is doubtful whether the jurisdictional issue should have been submitted to the jury, even had the evidence been in dispute. Except where the jurisdictional issue and the issues on the merits are factually 'completely intermeshed,' *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 362-363 (5th Cir. 1967), it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed.R.Civ.P., rather than the jury's function to resolve such disputes in the trial of the case on the merits.
>
> * * *
>
> In any event, there was no conflict in the evidence as to the facts relevant to jurisdiction. The undisputed facts established that the necessary relationship to interstate commerce did exist. In these circumstances, it was error to submit the jurisdictional issue to the jury under Rule 49(a).

487 F.2d at 375, 377.

Respondents cite *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977), for the argument that a plaintiff is properly required, at a hearing on

a motion to dismiss, to prove the jurisdictional facts "by a preponderance of the evidence." In fact, the court there said that "where the jurisdictional facts are intertwined with the merits," the plaintiff at a preliminary hearing "should be required only to establish a prima facie showing of jurisdictional facts," deferring full proof until trial. 557 F.2d at 1285-1286 n.2.

Ultimately, Respondents are compelled implicitly to concede Morsey's position and argue that the district court "in effect" applied the appropriate standards (i.e., those applicable to summary judgments or directed verdicts) "out of an abundance of caution."[8] The district court plainly did no such thing.[9]

Respondents, being unable to refute Morsey's argument, then seek to avoid it, arguing that Morsey waived his right to a jury trial.

Respondents' argument requires a complete distortion of what happened below.

The district court held that on the face of the complaint, there was no security. Then on Morsey's motion for rehearing, the court received evidence and entered fact findings to attempt to justify its prior dismissal. Morsey's timely jury demand was of record. To say that Morsey, on a rehearing granted in the court's discretion to consider reviving his complaint, was required to verbalize again his jury demand and object to the court's consideration of his rehearing motion defies logic and would require procedural suicide. None of the cases Respondents cite on waiver of jury trial involved a self-substantiating rehearing on a dismissed

[8]Bank's brief, p. 11.

[9]*See* A-28-32; Respondent Bank's Appendix A-2. The judge manifestly did not conclude that the facts were beyond reasonable dispute.

complaint.[10] Morsey was certainly not required to waive his right to a jury trial in order to have the trial judge correct a legally erroneous ruling.

Morsey appealed the district judge's preemptory determination that no security existed. Not once did appellees suggest that any deference was due the trial judge's fact findings. Not until the Fifth Circuit affirmed had there been any suggestion that the district judge's fact findings were reviewable on a "clearly erroneous" standard.[11] Morsey moved for rehearing, arguing that the court had applied the wrong standard to the fact findings — that the fact findings could properly be affirmed only under a summary judgment or a directed verdict standard.

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[10]Respondents' reliance on *Duignan v. United States*, 274 U.S. 195 (1925) is clearly misplaced. There the United States brought a statutory bill in equity to abate a liquor nuisance. The owner of the premises filed a cross bill against the lessee for forfeiture of the lease, which was granted. On the lessee's appeal, this Court held:

> Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed.

Morsey, on the other hand, timely demanded a jury trial.

In *Southland Reship, Inc. v. Flegel*, 534 F.2d 639 (5th Cir. 1976), counsel stated in open court that they "waived their right to a jury trial on liability while retaining their right to a jury on damages." 534 F.2d 644. Morsey expressed no such waiver.

Finally, in *National Family Ins. Co. v. Exchange Nat. Bank of Chicago*, 474 F.2d 237 (7th Cir. 1973), cert. denied, 414 U.S. 825 (1973), a factual hearing was held not on a dismissed complaint, but after a motion to dismiss was treated as one for summary judgment and then denied pending further factual development.

[11]The Fifth Circuit's affirmance cited Local Rule 21:

> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to

Morsey plainly has not waived his right to a jury trial. Morsey's not anticipating an erroneous ruling not even urged by Respondents cannot deprive him of so fundamental a right.

Moreover, even had Morsey failed to make this argument at the first opportunity (which he did not), the argument still would be properly before this Court. *See Carlson v. Green*, ___ U.S. ___, 100 S.Ct. 1468, 1471 n.2 (1980):

> Though we do not normally decide issues not presented below, we are not precluded from doing so.

Vance v. Terrazas, ___ U.S. ___, 100 S.Ct. 540, 544 n.5 (1980):

> Consideration of issues . . . not presented in the Court of Appeals is not beyond our power.

(Footnote 11 Continued)

the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

New York City Transit Authority v. Beazer, ___ U.S. ___, 99 S.Ct. 1355, 1364 n.24 (1979).

II

WHERE THE PROMOTER PROMISED TO MANAGE INCOME STREAMS AND TO USE HIS EXPERTISE, REPUTATION, AND MARKET POSITION TO SELL THE LAND AT A PROFIT, A PARTICIPATION IN A LAND SYNDICATION IS A SECURITY

Respondents try to avoid the merits of Morsey's securities claim. The Bank argues the facts, saying that Morsey controlled the investment because of the written trust agreement, and that his expectation of profit was based on a rising market. Green says that the district court simply applied "the established definitional tests" to "the economic realities and total circumstances" presented.[12]

Morsey testified that he relied on Green's market position, expertise, and reputation, and not on a rising market. He neither anticipated nor exercised any control over the investment.[13]

The district court held there was no security *because* the profit was going to come only from a resale and *because*

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[12]Green's brief pp. 11, 10.

[13]Indisputably, a written instrument is not always dispositive of the existence of a security. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943). See also *Grainger v. State Security Life Ins. Co.*, 547 F.2d 303, rehearing denied, 563 F.2d 215 (5th Cir. 1977).

Green was not going to develop the property physically.[14] These restrictions on the definition of a security do not simply apply established law to particular facts. They instead erroneously exempt an important class of investment schemes from the protections afforded by the securities laws.

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[11]As the court announced at trial:

> I ruled earlier in this case after an evidentiary hearing that the primary purpose of plaintiff's purchase of an interest in the Magnolia Ranch property was for resale of the land within a year at an increased price and not for development. The income from the grove and the leases were to be used to offset interest payments, thus my finding was that the anticipated increments in the value of the land was the basis for investment and not an expectation of profits from the income-producing operations of the property itself. As such this scheme was not a Section 21 investment contract as defined by the United States and Florida Supreme Court decisions. Hence, the federal securities laws and the Florida Blue Sky laws are inapplicable to the facts in this case. Accordingly, in light of all of the relevant evidence gathered in this cause and now further confirmed at this trial, I hereby reaffirm my decision to dismiss all claims under the Federal and Florida securities laws.

CONCLUSION

For these reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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